

No. 17-8768

IN THE SUPREME COURT OF THE UNITED STATES

OSIEL RODRIGUEZ, PETITIONER

v.

CHARLES RATLEDGE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

CHAD A. READLER
Acting Assistant Attorney General

BARBARA L. HERWIG
PATRICK G. NEMEROFF
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner, a federal prisoner, has a liberty interest under the Due Process Clause in avoiding assignment to the Administrative Maximum facility in Florence, Colorado (ADX Florence).

2. Whether petitioner's due process challenge to his transfer to ADX Florence is cognizable in a habeas corpus petition under 28 U.S.C. 2241.

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-8768

OSIEL RODRIGUEZ, PETITIONER

v.

CHARLES RATLEDGE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is not published in the Federal Reporter but is reprinted at 715 Fed. Appx. 261. The memorandum opinions of the district court (Pet. App. B1-B6, C1-C7) are not published in the Federal Supplement but are available at 2016 WL 589713 and 2017 WL 729130.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 2017. A petition for rehearing was denied on January 29, 2018 (Pet. App. D1-D2). The petition for a writ of certiorari was filed

on April 27, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted of bank robbery, conspiracy to commit bank robbery, carjacking, using a firearm during a crime of violence, and possession of a stolen firearm. C.A. Supp. App. 28. He was sentenced to 60 years of imprisonment. Ibid. In 2015, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 to challenge his transfer to the Administrative Maximum facility in Florence, Colorado (ADX Florence). Pet. App. A5-A6. The United States District Court for the Western District of Virginia denied the petition, id. at C1-C7, and the court of appeals affirmed, id. at A1-A12.

1. Petitioner is serving a 60-year term of imprisonment for bank robbery, conspiracy to commit bank robbery, using a firearm during a crime of violence, carjacking, and possession of a stolen firearm. C.A. Supp. App. 28. In 2003, and again in 2006, petitioner was found to have committed a disciplinary infraction by attempting to escape from a federal prison. Ibid.; Pet. App. C1. After his second attempted escape -- from a second federal prison -- petitioner was sent to ADX Florence, which has general population units "designed for male inmates who have demonstrated an inability to function in a less restrictive environment without being a threat to others, or to the secure and orderly operation of the institution." Pet. App. C3; see id. at C1. After

approximately seven years at ADX Florence, petitioner was transferred to the United States Penitentiary in Lee County, Virginia (USP Lee), in August 2013. Id. at C1. Petitioner attempted an escape from USP Lee in September 2014. Ibid.

A November 2014 incident report charged petitioner with two prison disciplinary violations -- one for the September 2014 attempted escape, and one for the attempted introduction of narcotics. Pet. App. A3-A4; C.A. Supp. App. 17. At a hearing on the charges, a Disciplinary Hearing Officer (DHO) found that petitioner had attempted to procure narcotics, but dismissed the attempted escape charge. Pet. App. A4; C.A. Supp. App. 19. To sanction petitioner, the DHO disallowed 41 days of good-conduct time, in addition to other penalties. Pet. App. A4.

After the hearing, but before the issuance of any formal report, the DHO noticed an apparent error in the November 2014 incident report. Pet. App. A4; C.A. Supp. App. 19-20. The DHO believed that, in light of the error, the November 2014 incident report did not support the attempted narcotics charge and had not provided petitioner adequate notice of the charges against him. Pet. App. A4; C.A. Supp. App. 20. Based on those concerns, the DHO requested a revision of the November 2014 incident report and asked that another DHO conduct a rehearing on the charges. Pet. App. A4; C.A. Supp. App. 20. The revised incident report addressed the original DHO's concerns about the November 2014 incident report and added more allegations relating to the attempted escape charge.

Pet. App. A4-A5. At a January 2015 rehearing on the charges, a second DHO found petitioner guilty on the attempted escape charge and not on the attempted narcotics charge. Id. at A5. The new DHO imposed the same penalties levied at the first hearing, including disallowance of 41 days of good-conduct time. Ibid.

In August 2015, petitioner received notice that he was being referred for a hearing regarding a possible transfer to ADX Florence. Pet. App. A5. The notice identified petitioner's three prior escape attempts as grounds for the transfer hearing, explaining that petitioner's conduct "creates a risk to institution security and good order [and] poses a risk to the safety of staff, inmates or others, or to public safety." Id. at C2 (brackets in original); see id. at A5. At the transfer hearing, petitioner stated that he was "not saying [he] did not attempt to escape from these facilities," but he contended that he "never displayed any violence in any of [his] attempts to leave custody." C.A. Supp. App. 27. Petitioner further stated that he was now "retired from this type of behavior." Ibid. Following the hearing, the hearing administrator recommended petitioner for transfer to ADX Florence. Pet. App. A5; C.A. Supp. App. 30-31. In January 2016, after petitioner filed an unsuccessful administrative appeal of the decision, he was transferred to that facility. Pet. App. C1, C3.

2. Petitioner subsequently filed two petitions for writs of habeas corpus under 28 U.S.C. 2241. Pet. App. A5-A6. In the first

petition, filed in February 2015, petitioner argued that the doctrines of res judicata and collateral estoppel barred the January 2015 rehearing on the attempted escape charge and that the rehearing therefore violated his due process rights. Id. at A5, B2-B3. In the second petition, filed in December 2015, petitioner contended that his transfer to ADX Florence violated his due process rights because it was based in part on the January 2015 rehearing. Id. at A5-A6. Petitioner did not allege that his transfer to ADX Florence imposed an atypical and significant hardship compared to the ordinary incidents of prison life, id. at C6, and he introduced no evidence regarding the conditions at ADX Florence in response to the district court's request for evidence supporting his claims, id. at C1 n.1, C6.

In 2016, the district court granted summary judgment in favor of the government on the first petition. Pet. App. B1-B6. The court determined that petitioner's challenge to the January 2015 rehearing failed on the merits because petitioner had not shown that the doctrines of res judicata and collateral estoppel applied to the DHO hearings. Id. at B5. The court also found "no final judgment or determination" following the first DHO hearing because "[t]he only DHO Report produced was after the second DHO hearing." Ibid.

In 2017, the district court granted summary judgment in favor of the government on the second petition. Pet. App. C1-C7. The court determined that petitioner's challenge to his transfer to

ADX Florence was not a proper habeas claim under 28 U.S.C. 2241. Pet. App. C5. The court further determined that petitioner had failed to state a civil rights claim because he had not demonstrated that his referral to ADX Florence implicated a protected liberty interest for purposes of the Due Process Clause. Id. at C6.

3. The court of appeals affirmed. Pet. App. A1-A12. As relevant here, the court determined that petitioner's challenge to his transfer to ADX Florence was "not a cognizable § 2241 claim." Pet. App. A9. The court reasoned that habeas petitions under 28 U.S.C. 2241 "are appropriate when an inmate seeks to challenge 'the very fact or duration of his physical imprisonment.'" Id. at A8 (quoting Preiser v. Rodriguez, 411 U.S. 475, 500 (1973)). And it found that petitioner's objection to his transfer to ADX Florence "challenge[d] the conditions of his confinement, not its fact or duration." Id. at A9.

The court of appeals noted that it had the authority to consider petitioner's challenge to his transfer as a constitutional tort claim under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), but observed that "Bivens provides relief in the form of damages," whereas petitioner was "seek[ing] a reversal of his transfer." Pet. App. A9 n.3. The court additionally noted that petitioner's claim "fails even construed as a Bivens complaint," because his "transfer did not implicate a protected liberty interest and did not violate

his due process rights.” Id. at A9-A10 n.3. The court explained that “[i]nmates do not have ‘a liberty interest in avoiding transfer’ unless the transfer would impose an ‘atypical and significant hardship’ compared to the general prison population.” Ibid. (quoting Wilkinson v. Austin, 545 U.S. 209, 221, 223 (2005)). The conditions at ADX Florence, the court found, “do not constitute an atypical and significant hardship.” Id. at A10 n.3.

ARGUMENT

Petitioner contends (Pet. 14-20) that he has a constitutionally protected liberty interest in avoiding a transfer to ADX Florence. Petitioner further contends (Pet. 7-14) that his due process challenge to that transfer is cognizable in a petition for a writ of habeas corpus under 28 U.S.C. 2241. The court of appeals correctly determined that petitioner’s transfer to ADX Florence does not warrant a writ of habeas corpus, and no court of appeals would have reached a different result. Further review is not warranted.

1. The court of appeals correctly determined that petitioner has no protected liberty interest in avoiding assignment to ADX Florence, and that decision does not conflict with any decision of this Court or any other court of appeals.

a. “The Due Process Clause standing alone confers no liberty interest in freedom from state action taken ‘within the sentence imposed.’” Sandin v. Conner, 515 U.S. 472, 480 (1995) (quoting Hewitt v. Helms, 459 U.S. 460, 468 (1983)). Thus, “the

Due Process Clause does not protect every change in the conditions of confinement having a substantial adverse impact on the prisoner.” Id. at 478. Due process rights are triggered only by an “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” Id. at 484.

In Wilkinson v. Austin, 545 U.S. 209 (2005), this Court concluded that prisoners “have a liberty interest in avoiding assignment to” Ohio’s supermax prison, because incarceration there “impose[d] an atypical and significant hardship under any plausible baseline.” Id. at 223-224. The Court cited a number of factors in support of that conclusion. First, for an inmate placed in that Ohio prison, “almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell”; “the light, though it may be dimmed, is on for 24 hours”; and exercise is for one hour per day in a small indoor room. Id. at 223-224. Second, placement in the Ohio supermax facility “is indefinite and, after an initial 30-day review, is reviewed just annually.” Id. at 224. Third, placement at that prison “disqualifies an otherwise eligible inmate for parole consideration.” Ibid. The Court reasoned that, “[w]hile any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context.” Ibid.

b. In contrast, petitioner has not demonstrated a liberty interest in avoiding transfer to ADX Florence.

As an initial matter, “the record does not indicate” that transfer to ADX Florence “imposes an atypical and significant hardship compared to the ordinary incidents of prison life.” Pet. App. C6. Petitioner did not allege such hardship in the district court, ibid., nor did he submit any evidence to support a finding of such hardship when the district court provided him the opportunity to build a record to support his claim, id. at C1 n.1, C6. And in the court of appeals, petitioner cited news articles, rather than to anything in the record, to support his description of the conditions at ADX Florence. Pet. C.A. Br. 4-5 & nn. 1-2; see also Pet. 2 & nn.1-2 (citing same articles).

In any event, the court of appeals correctly recognized that “[t]he conditions at ADX Florence do not constitute an atypical and significant hardship.” Pet. App. A10 n.3 (citing Rezaq v. Nalley, 677 F.3d 1001, 1014-1017 (10th Cir. 2012)). In Rezaq, the Tenth Circuit analyzed a more developed record and found that federal prisoners have no liberty interest in avoiding confinement at ADX Florence. See 677 F.3d at 1013-1017. The Tenth Circuit described the conditions there as “undeniably harsh” with “some similarities” to conditions at the Ohio prison at issue in Wilkinson. Id. at 1014-1015. But it observed that inmates at ADX Florence “had control over the lights in their cells, the opportunity for outdoor recreation, regular contact with staff, and the ability to occasionally communicate with other inmates.” Id. at 1014. And it found that the conditions, in themselves,

"are comparable to those routinely imposed in the administrative segregation setting" and "are not extreme as a matter of law." Id. at 1014-1015.

The Tenth Circuit identified key differences between ADX Florence and the Ohio supermax prison in Wilkinson. First, while incarceration in the Ohio facility resulted in loss of parole eligibility, placement in ADX Florence "does not increase the duration of confinement." Rezaq, 677 F.3d at 1015 (capitalization and emphasis omitted); see id. at 1015-1016. Second, ADX Florence, unlike the Ohio facility, provides inmates "regular reevaluations of their placement in the form of twice-yearly program reviews" that "included procedural protections." Id. at 1016.

c. Petitioner contends (Pet. 15-18) that courts of appeals "have not reached consistent conclusions" regarding "the baseline from which to measure what is atypical and significant in any particular prison system," Wilkinson, 545 U.S. at 223. This case, however, would be an unsuitable vehicle for addressing any disagreement on that issue. Petitioner identifies no court of appeals that has adopted an approach more favorable to his position than the court of appeals below. See Pet. 16-18. Nor does petitioner contend that any other circuit would find that inmates have a protected liberty interest in avoiding assignment to ADX Florence. See ibid. Because any plausible baseline would yield the same result for petitioner, further review of the appropriate baseline is not warranted.

d. In any event, even if petitioner's transfer to ADX Florence implicated a protected liberty interest, the Bureau of Prisons afforded petitioner adequate procedural protections before effectuating that transfer. For example, petitioner received written notice of the proposed transfer, and the notice described the facts underlying the transfer recommendation. Pet. App. A5, C2; C.A. Supp. App. 24-26. Petitioner also received a hearing on the transfer recommendation and availed himself of the opportunity to attend the hearing, to make an oral statement to the assigned hearing administrator, and to present documentary evidence on his behalf. C.A. Supp. App. 26-27. After the hearing administrator recommended petitioner for transfer, petitioner received a summary of the facts and reasons supporting that recommendation, along with notice of his right to pursue an administrative appeal. Id. at 26-31. And when petitioner appealed that decision to the Bureau of Prison's Designation and Sentence Computation Center (DSCC), the Chief of the DSCC provided petitioner a written response outlining the facts that led the DSCC to uphold petitioner's placement in ADX Florence. Id. at 32-33.

Accordingly, even if federal prisoners have a protected liberty interest in avoiding transfer to ADX Florence, the Bureau of Prisons' procedures are generally sufficient to protect that interest. Cf. Wilkinson, 545 U.S. at 225-229 (holding that similar procedures were adequate to safeguard an inmate's liberty interest in avoiding assignment to Ohio's supermax prison). And

petitioner's own case-specific challenge to the separate disciplinary proceedings in which he was determined to have attempted to escape does not suggest that he was denied due process when he was transferred. Petitioner's statements in the transfer proceedings, where he contended that he "never displayed any violence in any of [his] attempts to leave custody" without disputing that he did, in fact, attempt to escape, sever any chain of causation that might support a due process claim. C.A. Supp. App. 27; cf. Tollett v. Henderson, 411 U.S. 258, 266 (1973) (admissions in guilty plea "foreclose[] direct inquiry into the merits of claimed antecedent constitutional violations").

2. This Court has "left open the question" whether a prisoner may challenge the conditions of his confinement via a petition for a writ of habeas corpus. Ziglar v. Abbasi, 137 S. Ct. 1843, 1862-1863 (2017); see Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979) (leaving "to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement"). The Court has denied certiorari to multiple petitions raising that issue, see Robinson v. Sherrod, 565 U.S. 941 (2011) (No. 10-10351); Stanko v. Quay, 562 U.S. 844 (2010) (No. 09-10182), and it should follow the same course here. This case is a poor vehicle for resolving the question because petitioner cannot show that any court of appeals would conclude that he is entitled to a writ of habeas corpus under 28 U.S.C. 2241.

a. Section 2241 authorizes federal courts to issue a writ of habeas corpus to a state or federal prisoner who "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2241(c)(3). "[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and * * * the traditional function of the writ is to secure release from illegal custody." Preiser v. Rodriguez, 411 U.S. 475, 484 (1973). "[W]here an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence," that claim "fall[s] within the core of federal habeas corpus." Nelson v. Campbell, 541 U.S. 637, 643 (2004); see Preiser, 411 U.S. at 489. "By contrast, constitutional claims that merely challenge the conditions of a prisoner's confinement, whether the inmate seeks monetary or injunctive relief, fall outside of that core." Nelson, 541 U.S. at 643. Such claims may be brought by state prisoners under 42 U.S.C. 1983, which excludes from its scope claims that necessarily imply the invalidity of the fact or duration of confinement. See, e.g., Heck v. Humphrey, 512 U.S. 477, 487 (1994). For their part, federal prisoners may potentially be permitted to bring suits for injunctive relief outside habeas for claims of unconstitutional conditions in appropriate circumstances. See Free Enter. Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 491 n.2 (2010); Simmat v. United States Bureau of Prisons, 413 F.3d 1225, 1231-1232 (10th Cir. 2005).

b. The court of appeals determined that petitioner's challenge to his transfer to ADX Florence is not cognizable under Section 2241 because petitioner is challenging the conditions of his confinement, not its fact or duration. Pet. App. A9. Several courts of appeals have likewise concluded that a federal prisoner may not use a habeas corpus action to challenge conditions of confinement. See, e.g., Spencer v. Haynes, 774 F.3d 467, 469-470 (8th Cir. 2014) (holding that a writ of habeas corpus is not the proper remedy where a prisoner challenges the conditions of his confinement); Cardona v. Bledsoe, 681 F.3d 533, 535-537 (3d Cir. 2012) (denying habeas jurisdiction for prisoner's challenge to placement in prison's Special Management Unit), cert. denied, 568 U.S. 1077 (2012);* Palma-Salazar v. Davis, 677 F.3d 1031, 1035-1038 (10th Cir. 2012) (concluding that district court lacked habeas jurisdiction to consider prisoner's challenge to his placement in ADX Florence); Glaus v. Anderson, 408 F.3d 382, 388 (7th Cir. 2005) (holding that prisoner "may not proceed with a habeas corpus petition" to challenge "the conditions of his confinement").

* Although petitioner contends (Pet. 8) that the Third Circuit previously held otherwise in Woodall v. Federal Bureau of Prisons, 432 F.3d 235 (3d Cir. 2005), that case involved an inmate's challenge to an alleged delay in his transfer to a halfway house. Id. at 238-239. In the Third Circuit's view, the inmate's habeas petition "crosse[d] the line beyond a challenge to, for example, a garden variety prison transfer" because carrying out a sentence through detention in a halfway house "is very different from carrying out a sentence in an ordinary penal institution." Id. at 243. In any event, any intracircuit tension would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

Petitioner asserts that other circuits permit challenges to conditions of federal confinement through a Section 2241 petition. Pet. 8 (citing Aamer v. Obama, 742 F.3d 1023, 1038 (D.C. Cir. 2014); Thompson v. Choinski, 525 F.3d 205, 209 (2d Cir. 2008), cert. denied, 555 U.S. 1118 (2009); United States v. DeLeon, 444 F.3d 41, 59 (1st Cir. 2006)). But petitioner has not identified any circuit that would conclude that he is entitled to a writ of habeas corpus here. As explained above, petitioner has no liberty interest in avoiding placement in ADX Florence, and the process in place is constitutionally sufficient. Nothing in the petition suggests that any court of appeals would both reach the merits and accept petitioner's due process claim. And petitioner appears to recognize that the Court would have to grant certiorari and reverse on both questions in order for him to obtain relief. See Pet. i, 6-7. Accordingly, a decision by this Court that prisoners may use habeas petitions to challenge the conditions of their confinement would not affect the outcome of petitioner's case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

CHAD A. READLER
Acting Assistant Attorney General

BARBARA L. HERWIG
PATRICK G. NEMEROFF
Attorneys

AUGUST 2018